IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1301~~ 104

ALEXANDER TCHEREPNIN, MING TCHEREPNIN, CHARLES NOLL, MAYBELLE NOLL, HARRY BLOCK, JEANETTE A. BLOCK, WERNER D. BLOCK, ADRIAN DA PRATO, PETER DA PRATO, FREDERICK D. WAHL, ANNE W. WAHL, THEODORE MACHATKA, MARIE B. MACHATKA, JOSEPH NOVAK, FRANCES NOVAK, MARY-BETH SIMJACK, WALTER R. ANDERSON AND HELEN K. KELLOGG,

Petitioners,

vs.

JOSEPH E. KNIGHT, JUSTIN HULMAN, CITY SAVINGS ASSOCIATION, DENNIS KIRBY, HARRY HARTMAN, LOUIS KWASMAN, ROBERT FRANZ, STANLEY PASKO, JOSEPH TALARICO, JR., HERBERT J. HOOVER, ROBERT M. KRAMER, C. ORAN MENSIK AND GLORIA MENSIK SPRINCZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on January 20, 1967, which reversed an order of the District Court for the Northern District of Illinois denying defendants' motions to dismiss the complaint for lack of jurisdiction.

OPINIONS BELOW.

The opinion of the United States District Court has not been reported and is printed in the Appendix herein at page 19.

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit are reported in 371 F. 2d 374 and are printed in the Appendix herein at pages 20 and 30 respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 20, 1967 (App. 42, 43).[1] No rehearing was sought by the petitioners.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED.

1. Is a withdrawable capital share issued by a state-chartered savings and loan association "stock," a "transferable share," an "investment contract," a "certificate of interest or participation in a profit-sharing agreement," or otherwise within the definition of "security" contained in Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U. S. C. 78c(a)(10)?

2. Are withdrawable transferable shares in a mutual savings and loan association, which represent its only capital and entitle holders, who are not involved in the association's management, to participate in its net profits (or losses), securities within that definition, so that the anti-

1. "(App. . .)" is hereinafter used to refer to pages of the Appendix to this Petition.

fraud provisions of that Act are applicable to purchases and sales of such shares?[2]

STATUTES AND REGULATION INVOLVED.

The statutes and regulation which the case involves are:

1. Sections 3(a)(10), (13) and (14) of the Securities Exchange Act of 1934 (15 U. S. C., §§ 78c(a)(10), (13) and (14)).
2. Section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. § 78j(b)).
3. Section 29(b) of the Securities Exchange Act of 1934 (15 U. S. C. § 78cc(b)).
4. Rule 10b-5 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 (17 C. F. R. 240, 10b-5).

The full text of these statutes and regulation is set forth in the Appendix, *infra,* pages 43-45.

The Securities Exchange Act of 1934 is hereinafter referred to as "the 1934 Act."

STATEMENT OF THE CASE.

The Nature of the Action.

This is an action pursuant to Sections 10(b) and 29(b) of the 1934 Act (15 U. S. C. §§ 78j(b) and 78cc (b)) and Rule 10b-5 promulgated thereunder (17 C. F. R. 240, 10b-5). Defendants are City Savings Association (hereinafter

2. The complaint alleges that the sales of the shares here were on a restricted basis as to withdrawability (R. 13, 14). Obviously, the questions here presented as to withdrawable shares encompass the subsidiary question whether shares restricted against withdrawability are securities, and such question is comprised in the questions presented. See Rule 23(1)(c) of this Court. Sections 3(a)(13) and (14) of the Securities Exchange Act of 1934 (15 U. S. C. §§ 78c(a) (13) and (14) are involved in that subsidiary question.

"CSA"), its officers, directors and certain other persons. It is brought by about 150 investors in capital shares of CSA, on their own behalf and as a class action on behalf of over 5,000 investors who purchased such shares between July 24, 1959, and June 26, 1964 (R. 5-7, 14, 15).[3] They seek to rescind the purchases and to recover the purchase prices paid for the shares of CSA allegedly fraudulently sold to them (R. 8, 16, 17).

CSA is a savings and loan association chartered as a corporation under the Illinois Savings and Loan Act (hereinafter "the Illinois Act") (Ill. Rev. Stats., 1965, C. 32,[4] §§ 701-944). Under that Act, CSA was granted all general corporate powers, was permitted to carry on the business of a savings and loan association for its shareholders, and was permitted to make, among other investments, real estate and home improvement loans (Ill. Rev. Stats. 1965, C. 32, §§ 702, 791, 792). To secure capital to carry on this business CSA was permitted to and did continuously engage in issuing and selling its capital shares to public investors, including petitioners and the members of the class represented by them (Ill. Rev. Stats., 1965, C. 32, §§ 761, 762),[5] who thereby assumed the investment risk and the possibility of loss (in this instance estimated to be about 65%). The return, if any, to the investors depends entirely on the success of the directors and the management in investing such capital.

In June, 1964, CSA was seized by the Director of Financial Institutions of Illinois because of its distressed financial condition (R. 13, 15). A month later, upon learning the facts for the first time, petitioners filed this action.

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3. Record references are to the Joint Appendix filed in the Court below by respondents City Savings Association, Louis Kwasman, Joseph E. Knight, et al.

4. Chapter 32 of the Illinois Revised Statutes deals with Illinois corporations generally.

5. The complaint alleges that these capital shares were securities (R. 5, 8, 12-14). Respondents did not plead the attributes and

The Amended Complaint Alleges Material Frauds.[6]

1. Material Adverse Information Concerning CSA's Dominant Director and Principal Executive Officer Was Concealed.

At all relevant times, the board of directors of CSA, its policies and activities were dominated and controlled by one C. Oran Mensik. From about 1943 until filing of this action, Mensik was CSA's principal executive officer (R. 16).

Beginning in 1957, Mensik became the subject of a sub-

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characteristics of such shares, apparently content to rely on the Illinois statute. That Act provides that such shares are transferable (§§ 761, 768) and shall be evidenced by certificates (§ 768); that the holders share in net profits through dividends, when and if earned, and if declared by the directors (§§ 762, 778, 780); that shareholders may attend annual meetings (§ 743), vote for directors (§§ 742, 744), pass on organic changes, such as amendments of the articles of incorporation (§ 812), mergers (§ 816), sales of all or substantially all assets (§ 821), reorganizations (§ 872) and voluntary liquidations (§ 902), and upon dissolution or liquidation they are to receive their prorata share of the property of the association after payment of its debts (§§ 908, 926).

Petitioners have exhaustively analyzed the federal laws, and the laws of each of the fifty states and of the District of Columbia, relating to savings and loan associations, to determine whether the attributes of withdrawable capital shares of Illinois chartered associations are typical of investors' interests in associations throughout the country. Such research discloses that in almost every jurisdiction, as in Illinois, withdrawable capital interests are authorized to be issued, (a) which constitute capital of the common enterprise, (b) which entitle the investor to share in the profits (or losses) generated (c) solely as a result of efforts of others than the investors; (d) a certificate or account book is required to be issued as evidence of ownership of the investment, (e) the association may be a *mutual*, (f) it is required to be incorporated or chartered by the respective jurisdiction, (g) shareholders may vote on certain fundamental changes in the association, and in most jurisdictions in elections of directors.

6. Since the questions presented were tendered to the courts below by motions to dismiss for lack of subject-matter jurisdiction, the allegations of fact in the complaint must be treated as true. *Radovich* v. *National Football League*, 352 U. S. 445, 448 (1957); *Guessefeldt* v. *McGrath*, 342 U. S. 308, 310 (1952); *United States* v. *New Wrinkle*, 342 U. S. 371, 376 (1952); and *Collins* v. *Hardyman*, 341 U. S. 651, 652 (1951).

stantial flow of adverse publicity in which he was accused, among many other things, of certain specified misconduct as a director and officer of CSA in breach of his fiduciary duties, and of mismanagement (R. 8-11). In 1959, he was indicted in the U. S. District Court in Maryland on mail fraud charges involving savings and loan associations, and was ultimately convicted (R. 10, 11).

Because Mensik's name, thereafter, was not likely to engender trust and confidence in the minds of prospective CSA shareholders, Mensik and the other directors and officers of CSA in 1959 and continuously thereafter conspired to and did conceal from the investing public, including petitioners, that Mensik was in any way connected with CSA as a director or officer. Such concealment constituted the omission of material facts, the disclosure of which would have caused investors to refrain from investing in the shares which CSA was constantly issuing (R. 11, 12).

2. CSA's Financial Strength Was Misrepresented.

CSA solicited investments in its shares by sales literature mailed to investors in many states of the United States. That literature spoke of the financial strength of CSA and advanced reasons as to the desirability of investing in its shares. However, because CSA's financial policies and management were found to be unsafe, the Federal Home Loan Bank Board had rejected CSA's application for insurance of its shareholders' accounts, thus refusing the insurance customarily provided by that Agency to shareholders of both federal and state chartered savings and loan associations, leaving such accounts uninsured. CSA's sales literature did not disclose such rejection, the reason therefor, or any of such facts. Included in such mail solicitation, among others, were investors in federally

insured savings and loan associations, who in reliance upon such solicitations liquidated such investments and reinvested in CSA shares, thereupon becoming uninsured because of the above-stated non-disclosures (R. 12, 13).

3. CSA Concealed the Withdrawal Restrictions It Had Imposed Because of Its Financial Difficulties.

Beginning in 1957, CSA was in difficulties because its cash commitments far exceeded its cash resources, and it therefore imposed restrictions on withdrawals by investors. A 1959 amendment to the Illinois Act, under such circumstances permitted sales of new investments but prohibited CSA from placing withdrawal restrictions thereon. Nevertheless, after July 23, 1959, CSA contracted to sell restricted withdrawal shares to investors, including petitioners, without disclosing to them that such sales were unlawful, that CSA was on a restricted withdrawal basis, or that it had financial difficulties requiring such restrictions (R. 13, 14).

Respondents' Motions to Dismiss.

Insofar as here pertinent, respondents moved to dismiss the Complaint on the ground that Section 10(b) of the 1934 Act does not apply to fraudulent sales of withdrawable capital shares of savings and loan associations (R. 17-19).[7]

The District Court Sustained the Complaint.

The District Court held that petitioners had entered into "an investment contract and in effect are purchasers of securities within the meaning and provisions of the Exchange Act" (R. 19, App. 19). It certified its order for interlocutory appeal, pursuant to 28 U. S. C. § 1292(b) (App. 20).

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7. See also appendix filed in court below by respondents *Franz, et al.*, pp. 22, 23.

The Securities and Exchange Commission Supported Petitioners' Position Below.

The Securities and Exchange Commission (hereinafter "the SEC"), in the District Court and the Court of Appeals, participated as *amicus curiae,* for the stated reasons that the scope and meaning of the term "security" is of fundamental importance to the proper performance of its responsibilities and that the rulings on the questions here involved could affect the Commission's administration of both the Securities Act of 1933 and the 1934 Act. The SEC argued in both courts that the withdrawable capital share in a savings and loan association is a "security" within the meaning of the 1934 Act.

THE DECISION OF THE COURT OF APPEALS.

In rejecting the contentions of petitioners and the SEC, the majority below held that the interest represented by a CSA share could fall within the ambit of § 3(a)(10) of the 1934 Act only if such share was an "instrument commonly known as a 'security'" (App. 24). It concluded that such shares were not so known, and rendered the majority opinion without discussing whether or not such shares are within other definitions of "security" as found in the 1934 Act, including "stock," "certificates of interest or participation in profit-sharing agreement," "transferable share," or "investment contract."

Judge Cummings in a vigorous dissent disagreed with such narrow application of § 3(a)(10) of the Act and pointed out that the term "any instrument commonly known as a security," relied upon by the majority as the basis of its decision, is not, under *Llanos* v. *United States,* 206 Fed. 2d 852, 854, a limitation upon all of the other definitional categories of the 1934 Act.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE 7th CIRCUIT IS IN DEROGATION OF THE BASIC AIMS AND PURPOSES OF THE 1934 ACT AND REMOVES A LARGE SECTOR OF THE NATIONAL ECONOMY FROM ITS ENFORCEMENT AND ADMINISTRATIVE PROVISIONS.

1. The Purpose of the 1934 Act Is to Protect Investors.

The primary aim and purpose of the 1934 Act, as well as of the Securities Act of 1933 (15 U. S. C. 77a *et seq.*), is the protection of the general public and investors, including uninformed, gullible, ignorant and little investors.[8] *Surowitz* v. *Hilton Hotels Corporation* (1966), 383 U. S. 363; *Associated Securities Corporation* v. *Securities and Exchange Commission* (10 Cir., 1961), 293 F. 2d 738, 740; *Berko* v. *Securities and Exchange Commission* (2 Cir., 1963), 316 F. 2d 137, 141 and cases there cited. The 7th Circuit is in agreement. *Surowitz* v. *Hilton Hotels Corporation* (1965), 342 F. 2d 596, 602. This protection extends to all securities, whether registered or not, involved in transactions in which the mails or other instrumentalities of interstate commerce are used (§ 10(b)), and whether such transactions take place on a stock exchange or in a stock handling business or elsewhere. *Fratt* v. *Robinson* (9 Cir., 1953), 203 F. 2d 627, 630, 631; *Kardon* v. *National Gypsum Co.* (D. C. E. D. Pa., 1946), 69 F. Supp. 512.

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8. Judge Cummings eloquently sets forth how the aims and purposes of the 1934 Act are served by the application of that Act "to the typical savings and loan account-holder [who] is a small investor, as unwary and in need of protection as a typical, unsophisticated holder of corporate stock" (App. 41, 42).

2. The Questions Presented Have National Scope.

In the instant case, there are about 150 petitioners and approximately 5,000 holders of capital shares in the class represented by them. In addition, the holders of like shares constitute an immense segment of the national economy. As of December 31, 1964 (the latest date for which statistics are available), throughout the United States there were 38,853,912 separate capital share accounts invested in savings and loan associations, aggregating over $102 billion. *United States Savings and Loan League, 1965 Annals,* pp. 244, 250. Such withdrawable capital shares throughout the nation are typified by the same general characteristics and attributes as those here involved.[9] Therefore, the majority decision below has countrywide impact in holding that, regardless of the characteristics and attributes hereinabove set forth, pp. 4 and 5, such capital shares are not securities within the definition of the 1934 Act. Millions of present and future holders of such shares, as well as untold numbers of holders of many other types of securities not "commonly known" as such, by this decision would be deprived of the protections against fraud and misrepresentation afforded by the 1934 Act to investors in other securities.

3. The Decision Below Frustrates to a Substantial Degree the Enforcement and Administration of the 1934 Act by Constricting the Statutory Definition of "Security".

The importance of the question here presented to the enforcement and administration of the 1934 Act is demonstrated by the fact that the statutory terms which give rise to the questions here presented are definitional, and

9. *Cf. Legal Bulletin of the United States Savings and Loan League,* July 1962, pp. 129-234.

the extent of the application of the entire Act depends upon the interpretation of those terms. Judge Cummings' dissenting opinion decries the unjustifiably narrow interpretation of § 3(a)(10) by the majority below and the consequent harmful effect on the broad remedial purposes of the 1934 Act (App. 33-35). He could not accept the majority's rejection of the liberal, flexible tests laid down by this Court in defining "security." *Securities and Exchange Commission* v. *Joiner Corporation*, 320 U. S. 344 (1943); *Securities and Exchange Commission* v. *W. J. Howey Company*, 328 U. S. 293 (1946); *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company of America*, 359 U. S. 65 (1959) and *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963).[10]

It becomes immediately apparent that once the breadth of the statutory definition is cut down by excluding any interest not commonly known as a "security", the enforcement of the Act is correspondingly curtailed, restricted and frustrated. If the interpretation by the majority below is permitted to stand, it would serve as a guide to the crafty bent on evolving sophisticated schemes to mulct the

10. Judge Cummings points out that *W. J. Howey* establishes that "the term security embodies a flexible rather than a static principle" in order to meet the "variable schemes devised by those who seek the use of the money of others on the promise of profits" and that *Variable Annuities* and *Joiner* indicate that the 1933 and 1934 Acts are to be "liberally construed in view of their remedial purpose" (App. 33-35). He is therefore critical of the majority interpretation limited solely to whether or not a CSA capital share is "an instrument commonly known as a security" (App. 34). In arriving at his decision that CSA capital shares are securities, Judge Cummings considered additional categories of securities set forth in Section 3(a)(10) of the Act, including "investment contract," "stock," "transferable share" and a "certificate of interest or participation in a profit-sharing agreement" (App. 34). He pointed out that " 'the clause in Section 3(a)(10) referring to "in general any instrument commonly known as a 'security' " is not a limitation upon the preceding categories. *Llanos* v. *United States*, 206 F. 2d 852, 854 (9th Cir., 1953).' " (App. 34.)

investing public by circumventing the protections to investors provided by Congress when it enacted the 1934 Act.

The enforcement and administration of that Act in the public interest are primarily lodged with the SEC, *Berko,* p. 141, but in addition thereto, private litigants, such as petitioners, are given a right of action under § 10(b) against those allegedly defrauding them, *Fratt,* pp. 631-33. Such investors thus become ancillary enforcers of the 1934 Act and function independently of the SEC in achieving the Act's broad social policies. To a very considerable extent, potential violators are deterred from illegal and possibly criminal conduct by the knowledge that any individual investor can call them to account. The beneficial effect of such private enforcement has long been recognized in antitrust litigation. *Monarch Life Insurance Company* v. *Loyal Protective Life Insurance Company* (2 Cir., 1963), 326 F. 2d 841, 846; *Osborne* v. *Sinclair Refining Company* (4 Cir., 1963), 324 F. 2d 566, 572; *C. I. R.* v. *Obear-Nester Glass Corporation* (7 Cir., 1954), 217 F. 2d 56, 61; *Maltz* v. *Sax* (7 Cir., 1943), 134 F. 2d 2, 4.

Had the decision of the Court below been limited to interests with the characteristics of which CSA capital shares are typical, the impact nationwide on all investors in withdrawable capital shares of savings and loan associations would have been serious enough to warrant review here; but the opinion below is of wider scope. The broad swath cut through the statutory definition by the decision below, in holding that the 1934 Act applies only to an interest "commonly known" as a "security", leaves standing few of the definitional principles enunciated by this Court during the past thirty years since Congress defined "security" in the Securities Act of 1933. Such long-established principles are equally applicable to interpretation of the 1934 Act, as shown hereinafter in point II, but have been rejected by the Court below.

II.

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH PRINCIPLES ESTABLISHED BY PRIOR DECISIONS OF THIS COURT.

It is Petitioners' position that the decisions of this Court interpreting the definition of "security" in the Securities Act of 1933 establish principles which must be followed in interpreting the definition of "security" in the 1934 Act.

In *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), this Court said that the meaning of "security" within the Securities Act of 1933 "does not stop with the obvious and common-place" and that, to carry out the legislative policy of protecting little investors against devices "widely offered . . . under terms or courses of dealing which established their character in commerce as 'investment contracts'" must be considered "securities" within the reach of the Act. Accordingly, oil and gas leases were held to be "securities" even though not commonly recognized as such or traded on securities exchanges or in established over-the-counter markets.

In *S. E. C.* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), this Court established that Congress's express inclusion of any "investment contract" in the definition of "security" in the Securities Act of 1933 demonstrated a legislative intention that any "contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment'" are "investment contract" securities, and "situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves" are subject to the 1933 Act. Applying that principle, this Court held that "units of a citrus grove devel-

opment coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor" were "securities", again, even though not commonly recognized as such nor traded on securities exchanges or in established over-the-counter markets.

In *S. E. C.* v. *Variable Annuity Life Insurance Company*, 359 U. S. 65 (1959), the Court held, per Mr. Justice Douglas, that variable annuities which give the annuitant an "indirect interest in equities" and place the risk of portfolio losses ultimately on the holder are "securities" subject to the 1933 Act. As the concurring opinion of Justice Brennan pointed out, an interest is a "security" where repayment depends on the condition of the investment portfolio.

Although the *Joiner, Howey* and *Variable Annuity* cases involved the definition of "security" under the 1933 Act, the principles of interpretation *and* the interpretation established in these cases are equally applicable to the definition of "security" in the 1934 Act. In the first place, the language of both statutes is substantially identical. Indeed, the statutory definition of a "security" in the 1934 Act, Section 3(a)(10) is identical to the definition in the 1933 Act in including within its coverage *inter alia*, any "stock . . . certificate of interest or participation in any profit-sharing agreement . . . transferable share, investment contract, or, in general, any instrument commonly known as a security . . .". That the two statutes are to be read *in pari materia* is further established by the *Howey* opinion. The Court there observed that "By including the term investment contract within the scope of § 2(1) of the Securities Act Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation" of that very term. 328 U. S. at 298. It is equally apparent that, by including the term "security" in the 1934 Act and by including in its statutory definition interests, such as investment contract, identical to the interests encom-

passed by that term in the 1933 Act, Congress is using a term the meaning of which had been crystallized by Congress itself the year before.

Given the characteristics of petitioners' interests in CSA, the decision and reasoning of the majority below is plainly in conflict with the principles laid down in *Joiner, Howey* and *Variable Annuity.* The petitioners' interests in CSA are referred to in the applicable corporate law as "shares" (Ill. Rev. Stats., 1965, C. 32, § 761).

Purchasers of these shares are referred to as "holders," (§ 773), the shares are required by statute to be evidenced by one or more certificates" (§ 768(a)), and are transferable by assignment (§ 768(b)). The capital derived by the association through sales of its shares, is invested by the management of the association at the risk of investors, so that if management fails to produce a profit the investors suffer the loss.

CSA, like other similar associations, vigorously solicited the entire public to invest savings in its capital shares and then reinvested the resulting and often small individual investments in, *inter alia,* real estate mortgages, municipal securities and other "marketable investment securities" (§§ 791, 792). CSA's investments were selected and made by decision solely of CSA's board of directors and officers. If those investments turned out to be unwise or unsound, petitioners and other CSA capital shareholders stood to lose their investments—in many cases, the savings of a lifetime. The investment risk was theirs alone, a critical factor, as observed by Mr. Justice Brennan in *Variable Annuity,* 359 U. S. at 77-80.

Judge Cummings points out that the oil leases in *Joiner,* the citrus grove units in *Howey,* the variable annuities in *Variable Annuity* and the interests in fishing boats, automobile trailers, vending machines, parking meters, ceme-

tery lots, tung trees, vineyards, fig orchards, farm lands and patent rights have been held to be "securities" in decisions of lower federal courts, see *e.g.*, 1 Loss, Securities Regulation (2 ed. 1961), pp. 490-91 and 1962 Supplement p. 30 (App. 34). So here, the attributes of petitioners' capital shares in CSA established their character in commerce as "investment contracts" and thus as securities subject to the 1934 Act.[11]

By narrowing the definition of "security" and thereby refusing to find that the interests before the Court are "investment contracts," the decision below is in conflict with the *Howey* interpretation of "investment contract". To paraphrase *Howey,* petitioners and other CSA investors placed capital or laid out money in a way to secure income

11. When the first federal securities law was enacted in 1933, the Secretary of the United States Building and Loan League advised its member associations that they were "subject to the fraud provisions" of that Act—something which would only have been true if he and the League had understood shares in member associations to be "securities." See *Building and Loan Annals* (1933), pp. 564-65. See also Richards, *The Federal Securities Act,* Building and Loan Annals (1933), pp. 111, 115-118. More recently, the United States Savings and Loan League has promoted purchases of savings and loan association shares identical to those purchased by petitioners by publicizing such shares as qualified "securities" or "investments" for trustees, guardians, estates and other fiduciaries. See *Savings and Loan Accounts as Legal Investments,* a research staff article in Legal Bulletin of the U. S. Savings and Loan League (July 1962). The Illinois legislature understands plaintiffs' interests to be "securities" by expressly describing them as "securities" in the Illinois Blue Sky Law since 1919. (Rev. Stat. Ill. 1919, Hurd c. 121a, 86 § 5(3); Ill. Rev. Stat. 1951, c. 121½, § 99(2); Ill. Rev. Stat. 1965, c. 121½, § 137.3), and by specifically exempting them along with certain other specified securities such as those listed on certain registered exchanges, from the "securities" made subject to Article 8 of the Uniform Commercial Code. Finally, decisions of lower federal courts have reaffirmed that savings and loan association shares are commonly recognized as investment contracts or securities. *Cf. Wisconsin Bankers Association* v. *Robertson,* 294 F. 2d 714 (D. C. Cir. 1961); *S. E. C.* v. *American International Savings and Loan Ass'n.,* 199 F. Supp. 341 (D. Md. 1961); *United States* v. *Hopps,* 215 F. Supp. 734, 754 (D. Md. (1962)), aff'd, 331 F. 2d 332 (4th Cir. 1964).

or profit (in the form of dividends) from its employment, "where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of . . . someone other than themselves," *i.e.*, the board of directors and officers of CSA (328 U. S. at 298).

On the other hand, immediate withdrawability and certain other attributes cited by the majority as uncommon to securities merely demonstrate that those interests are similar to mutual fund shares. As pointed out by Judge Cummings, mutual fund shares are of course "securities" subject to the anti-fraud provisions of the 1933 and 1934 Acts" (App. 38).

CONCLUSION.

Judge Cummings' well reasoned opinion demonstrates the need for review by this Court of the majority opinion below. For the reasons therein and hereinabove stated, the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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